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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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THE FALLACIES OF THE RESPONDENT'S ARGUMENT

The respondent's argument has two fundamental fallacies: (1) it erroneously assumes that there is only *one* method (an equitable defense in an action at law) by which a court of both law and equity powers can issue an *injunction* restraining a plaintiff from pursuing the remedy of his action; and (2) it overlooks the fact that a Section 3 Arbitration Act order is injunctive in substance.

1. The Erroneous Assumption That There is Only One Method (Equitable Defense in an Action at Law) by Which an Injunction May Issue to Restrain the Prosecution of an Action.

The respondent's argument is that *only* when the plaintiff's action is on the law side of the court can a stay entered under Section 3 of the federal Arbitration Act (9 USC 3) amount to an injunction because "an injunction may be granted only in equity" and "it must be directed against the other side of the court — the law side — to permit the legal fiction that there are two actions present and that one is staying the other. If the action itself is in equity, and if the defense upon which the stay is based also is equitable, then there is only one indivisible action and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, of two actions, one operating against the other" (respondent's brief pp. 10-11).

Implicit in this argument is the contention that a court of equity will not enjoin its own proceedings, a contention which has been rejected by the courts.

In the case of *The Erie Railroad Company v. Ramsey* (1871) 45 N. Y. 637, where an injunction restraining the further prosecution of *another* equitable action in the same court was upheld, the Court of Appeals of New York said (p. 650 of 45 N. Y.):

> "* * * it has been said in general terms by courts of chancery, that the court does not enjoin its own proceedings * * * It is true, however, that a court of equity has restrained and does restrain its own suitors. Drewey on Injunctions, 105, states it as well settled, that court of equity will exercise jurisdiction to restrain other proceedings in the same court. So in *Willard On Equity Jurisprudence*, 350, 351, it is said: 'As an injunction to restrain proceedings at law is di-

> rected only to the parties, and assumes no superiority over the court in which the action is pending but is granted solely on the ground that some equitable circumstances exist, which render the prosecution at law against conscience; there is no reason why an injunction should not be granted by the court in which the action is pending, if the court has jurisdiction both at law and in equity'."

The same rule was also recognized in *Farwell v. Great Western Telegraph Co.*, 161 Ill. 522, 44 N. E. 891, 922, where the court said (p. 617 of 161 Ill.):

> "On principle and authority, it must be held that, in a case demanding it, jurisdiction exists in a court of equity to grant an injunction in one action to affect the proceedings in another action already pending in the same court, whether they be actions at law or in equity."

Likewise in *Trees v. Glenn*, 319 Pa. 487, 490, 181 A. 579, 580, 102 A. L. R. 305, the court said:

> "Appellant's counsel argue that equity will refuse to enjoin a party from proceeding in equity. They are mistaken in this. Under certain conditions an equity court will issue its process to restrain a litigant from proceeding in another equity tribunal."

See also:

> *Mann v. Flowers*, 26 Minn. 479, 5 N. W. 365; Annotation 102 A. L. R. 308.

The Court of Appeals of New York in the *Ramsey* case, *supra*, also ruled that the restraint could issue in the very action on the equity side if all of the parties are before the court, or by an appropriate equitable cross action bringing in the necessary parties; and that under either method the restraint is by an injunction. Said the court (p. 649 of 45 N. Y.):

"If it be said that the court can act upon its suitors by way of *restraint* in the very action which they are then prosecuting before it, one answer is that all the persons to be *restrained* and *affected by injunction*, temporary and perpetual, may not be parties to that action, and so not in the power of the court (Story, Eq. Juris., §891b) * * *. So that it may well be, that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross action, in which other facts shall be presented and other persons made parties, and in which last action, it may be needful that an injunction order issue, restraining the prosecution of the first. (See *Thursby v. Wills*, 1 Code Rep. 83.) And accordingly we find the circuit courts of the United States, on the equity side, entertaining a bill and awarding an injunction to restrain proceedings on the law side thereof. And it is held that this may be done before the commencement of the suit at law, pending such suit, or after its decision by the highest law tribunal. (*Parker v. Judges, etc.*, 12 Wheat. 561; *Dunlop v. Sisson*, 4 Mason 349; *Humphrey v. Leggett*, 9 Ho. U. S. 297; *Nixdorff v. Smith*, 16 Peters 132)" (Italics supplied).

Where not restricted by statute, the federal courts in the exercising of their own equity powers have also restrained parties from commencing or prosecuting actions in equity.

See:

Commercial Acetylene Co. v. Avery Portable Lighting Co. (1906, E. D. Wis.) 15 2d F. 642, 644, affirmed in (1908-CA 7) 159 F. 935;

Missouri Railway Co. v. Jones (1909-W. D. Mo.) 170 F. 124;

Libbey Glass Co. v. McKee Glass Co. (1914-W. D. Pa.) 216 F. 172, affirmed in (1915-CA 3) 220 F. 672, writ of certiorari denied in (1915) 238 U. S. 624.

Therefore, the fact that the action in the present case is in equity rather than at law does not prevent the issuance of an injunctive restraining order. When the action is on the law side the equitable defense concept has been applied (*Shanferoke* case, 293 U. S. 449) and when the action is on the equity side the cross action concept could be applied, unless this Court should decide, as the majority did in the *Morgantown* case (257 U. S. 254), that the order itself should determine, without regard to archaic principles of procedure, whether it is injunctive in character.

2. Respondent has Overlooked the Fact That a Section 3 Arbitration Act Order is Injunctive in Substance.

It is most important to observe that the respondent does not contend that the object and purpose of the order in the *Shanferoke* case differs from the object and purpose of the order in the case at bar. The fact is their objective is identical. In each case an application for a stay is made under the same statute (9 USC 3) and in each case the statute conceives that the plaintiff should be restrained from recovering the remedy of his action pending arbitration in accordance with the agreement.

The respondent concedes that the order in the *Shanferoke* case has been regarded by this Court as an injunction and since the substance of the order in the instant case is identical and is also issued under equity powers, it too should be regarded as an injunction.

CONCLUSION

For the reasons given, the contentions of the respondent are without merit and the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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